

Banks v Marc Mordecai Liechtung, DMD, P.C.

2022 NY Slip Op 30715(U)

March 2, 2022

Supreme Court, New York County

Docket Number: Index No. 805318/2015

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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DEBRA BANKS,

Plaintiff,

INDEX NO. 805318/2015

MOTION DATE 01/11/2022

MOTION SEQ. NO. 002

- v -

MARC MORDECAI LIECHTUNG, DMD, P.C., individually
and doing business as MANHATTAN DENTAL ARTS,
MARC LIECHTUNG, D.M.D., individually and doing
business as MANHATTAN DENTAL ARTS, SOUTH
SHORE ORAL SURGERY ASSOCIATES, P.C., RICHARD
M. MIRRA, D.D.S., MITCHELL MEHLMAN, DDS, P.C., and
MITCHELL MEHLMAN, D.D.S.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120 were read on this motion to/for DISCOVERY/X-MOTION FOR DISCOVERY

In this action to recover damages for dental malpractice, the plaintiff moves pursuant to CPLR 3124 to compel the defendants to produce certain items of discovery and comply with prior discovery orders or, alternatively, pursuant to CPLR 3126 to strike their answers. The defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S. (together the Mirra defendants) oppose the motion. The defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S. (together the Mehlman defendants), oppose the motion, and cross-move (a) to "deny" the plaintiff's motion to compel, (b) pursuant to CPLR 2221(a) to vacate this court's September 1, 2021 status conference order, and (c) thereupon pursuant to CPLR 3103 for a protective order permitting them to withhold certain items of discovery requested by the plaintiff. By so-ordered stipulation dated January 10, 2022, the plaintiff was permitted to withdraw her motion insofar as asserted against the defendants Marc Mordecai Liechtung, DMD, P.C., individually and doing business as Manhattan Dental Arts, and Marc Mordecai

Liechtung, DMD, individually and doing business as Manhattan Dental Arts (together the Liechtung defendants).

The branches of the motion seeking relief against the Mirra defendants and the Mehlman defendants are granted to the extent that the Mirra defendants and the Mehlman defendants shall, on or before April 19, 2022, provide certain items of discovery in accordance herewith, and the motion otherwise is denied. The Mehlman defendants' cross motion is granted to the extent that the provision in the September 1, 2021 status conference order directing them defendants to provide "documentation, with patients' names redacted, as to instances in which they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment" is vacated, and the Mehlman defendants instead are directed to inform the other parties as to the number of times that they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment, and the duration of time over which those procedures were performed. The cross motion is otherwise denied.

In her motion, the plaintiff specifically seeks to compel the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., to produce the typed notes of the plaintiff's chart, a listing of continuing dental education courses that Mirra attended since 2006, and proof of continuing dental education courses he has taken since 2016, in accordance with the plaintiff's July 12, 2019 notice for discovery and inspection. The plaintiff further seeks to compel the Mehlman defendants to exchange all x-rays in their original DEXIS format, so as to depict the imprint the date that the x-ray was taken. She also seeks to compel them to provide, in response to her December 11, 2019 notice for discovery and inspection, information and materials as to continuing dental education courses that Mehlman attended and were referable to Zest dental anchors, along with the insert and instructions accompanying Zest dental anchors as of 2014, information as to continuing dental education courses that Mehlman attended, literature in the Mehlman defendants' possession supporting any contention that three implants could be used to support maxillary overdenture, the names of dental assistants employed by the

Mehlman defendants at the time of the plaintiff's treatment, documentation concerning antibiotics prescribed to the plaintiff, and documentation concerning other instances, with redaction of names, in which the Mehlman defendants employed three implants on other patients used to support a maxillary overdenture. In addition, she seeks to compel all of the defendants to respond to her December 13, 2019 demands for bills of particulars as to affirmative defenses, and to provide written notes relied upon by one or more defendants at a deposition to refresh the deponent's recollection.

The court adjourned this motion in order to conduct a status conference, at which it was anticipated that many of these issues, as well as any other outstanding discovery matters, would be resolved. The court conducted a remote conference on September 1, 2021, at which many disputed discovery issues were discussed, thus satisfying a condition precedent to the plaintiff's submission of this motion (see 22 NYCRR 202.20-f[b]).

In its September 1, 2021 status conference order, issued immediately after the conference, this court directed that

"on or before October 15, 2021, Liechtung defendants shall undertake a diligent search of digital x-rays of plaintiff and, if in existence, shall produce them; if in existence, but are not in a form that can be readily reproduced, shall provide an affirmation as to why; if not in existence, or not locatable, a *Jackson* affidavit attesting either that they cannot be located or describing the nature and extent of the search. On or before October 15, 2021, Liechtung defendants shall submit to the court, for an in camera inspection, any Snap-On-Smile [brochure] in their possession as of 2/19 that was generated after they rendered treatment to the plaintiff, and, to the extent not already provided, shall provide the parties with any Snap-On-Smile brochure in their possession as of the last date that they rendered treatment to the plaintiff."

The court further directed that,

"[o]n or before October 15, 2021, the Mehlman defendants shall produce either a printout from the appropriate dental society/association of all continuing dental education courses they attended or an authorization permitting the plaintiff to obtain those records; during that 45-day period the parties shall confer with each other and attempt to resolve that dispute. On or before October 15, 2021, Liechtung defendants shall supplement their responses to plaintiff's 2/28/19 notice for discovery and inspection by producing studies/reports of Gordon Christensen in their possession regarding Snap-On-Smiles as of the date of last

treatment. On or before October 15, 2021, Liechtung defendants shall supplement their response to plaintiff's 11/5/15 notice for discovery and inspection by producing a listing of the continuing dental education courses that they attended."

In addition, it ordered that,

"[o]n or before October 15, 2021, South Shore/Mirra shall produce a listing of the continuing dental education courses that they attended, along with proof of attendance. On or before October 15, 2021 the Mehlman defendants shall produce all x-ray films in their original DEXIS format so as to include the date that the film was generated, and supplement their 11/2/20 response to plaintiff's 12/11/19 post-EBT demand by providing insert and instructions for Zest anchors as of 2014, CDE literature in their possession generated prior to the last date of plaintiff's treatment supporting their contention that three implants could be used to support maxillary overdenture, names of dental assistants during the course of plaintiff's treatment, documents in their possession concerning antibiotics prescribed to plaintiff, documentation, with patients' names redacted, as to instances in which they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment."

Finally, the court directed that,

"[o]n or before October 15, 2021 all defendants, to the extent not already completed, shall respond to the plaintiff's 12/13/19 demand for a bill of particulars as to affirmative defenses, or shall supplement them, if warranted."

The court specifically declined to direct any of the defendants to produce manufacturers' or distributors' brochures, peer-reviewed literature referable to the procedure, products, and equipment employed in treating plaintiff, or continuing dental education handouts or publications in the possession of said defendant to the extent that any such documentation was generated subsequent to that defendant's last treatment of plaintiff. Rather, it deferred determination of that issue until consideration of this motion. The court also left for future determination whether any defendant who testified at a deposition must produce notes that were employed at that deposition to refresh that defendant's recollection.

Since the issuance of that status conference order, the plaintiff and the Liechtung defendants have resolved their outstanding discovery disputes. Moreover, in light of the issuance of the status conference order, most of the issues that are subject the plaintiff's motion here have been rendered academic, with the exception of the typed notes prepared by the Mirra

defendants with respect to the plaintiff's chart, documentation of the Mirra defendants' and Mehlman defendants' post-treatment continuing dental education, and the written notes employed by at least one defendant to refresh his recollection at his deposition.

In their opposition papers, the Mirra defendants and the Mehlman defendants both contend that there is no basis upon which to compel them to produce documentation concerning continuing dental education courses that they attended subsequent to their treatment of the patient. They assert that such information is irrelevant and that producing it would be burdensome. The plaintiff asserts that she needs this information so that she is able to ascertain the applicable standard of care in the dental community as of the time of her treatment, and prevent the defendants from claiming that they conformed to a standard of care that was not yet accepted at the time that they rendered treatment. The court rejects the arguments of the Mirra defendants and the Mehlman defendants. These defendants have made no showing that production of any such documentation would be burdensome. Moreover, information concerning their continuing dental education, even subsequent to their treatment of the plaintiff, may lead to the discovery of relevant information. As at least one court noted, documentation of a defendant's post-treatment, continuing dental education history is discoverable, as "the scope of discovery is much broader than the scope of admissibility, and plaintiff has set forth a sufficient showing as to why she seeks the discovery in question" (*Fuhrmann v Aesthetic Dentistry by DiPilla, P.C.*, 2016 NY Slip Op 30811[U], *3, 2016 NY Misc LEXIS 1648, *4-5 [Sup Ct, N.Y. County, Apr. 26, 2016]).

That branch of the Mehlman defendants' cross motion that seeks to deny the plaintiff's motion must be denied, as it does not seek any affirmative relief and, hence, is not the proper subject of a cross motion (*see Koegler v Amraly*, 2020 NY Slip Op 50858[U], 68 Misc 3d 1204[A] [Sup Ct, N.Y. County, Jul. 22, 2020]).

The Mehlman defendants also cross-move to vacate all of the directives in the September 1, 2021 status conference order as applied to them, except those ordering them to

provide, in response to the plaintiff's demand, a list of all pre-treatment continuing dental education courses taken, and to respond to the plaintiff's December 11, 2019 post-deposition demands for discovery and inspection. They contend that, inasmuch as the plaintiff's motion, which was then pending, did not seek to compel them to provide any other items of discovery, the status conference order "improperly" directed that they serve additional discovery items. The court rejects this contention. The court may, in its discretion, at any time, order "such conferences as the court may deem helpful or necessary in any matter before the court" (22 NYCRR 202.12[j]). Inasmuch as the court did not limit the scope of the issues to be discussed and determined at the status conference to those raised by the plaintiff's motion, it did not improperly include directives necessary to managing disclosure in this action (*see generally* 22 NYCRR 202.20-g[3]).

Nonetheless, as to the directive requiring production of documentation of all prior occasions on which the Mehlman defendants employed three implants to support maxillary overdenture, the court agrees with them that the discovery directed in the conference order would be burdensome and would not necessarily lead to the disclosure of relevant information. Hence, that provision should be stricken. The court concludes, however, that the issues of whether the Mehlman defendants had performed such procedures with any frequency prior to the plaintiff's treatment, and whether they were the only practitioners who employed that procedure, is quite relevant to the ultimate issue of whether they departed from good and accepted dental care (*see Nozhnik v NJS Carpentry*, 194 AD3d 616, 616 [1st Dept 2021], *affg Nozhnik v NJS Carpentry* Index No. 114010/2005 [Sup Ct, N.Y. County, Oct. 18, 2019] [since particular procedure was "uncommon" in the medical profession, and defendant was the only practitioner employing it, order setting aside defense verdict as contrary to weight of evidence is affirmed]). Consequently, the Mehlman defendants are directed to inform the other parties as to the number of times that they employed three implants to support maxillary overdenture prior to

the last date of the plaintiff's treatment, and the period of time over which those procedures were performed.

To the extent that the plaintiff seeks disclosure of written notes employed or relied upon by any of the defendants at his deposition, she is entitled to production of those notes. A party is deemed to have waived the privilege that applies to material prepared for litigation if that material is reviewed by a witness to refresh his or her recollection prior to a trial or deposition and the testimony is based, at least in part, on that material (*see Fernekes v Catskill Regional Med. Ctr.*, 75 AD3d 959, 961 [3d Dept 2010]; *Matter of Lenny McN.*, 183 AD2d 627, 627-628 [1st Dept 1992]; *Stern v Aetna Casualty & Surety Co.*, 159 AD2d 1013, 1013-1014 [4th Dept 1990]; *Rouse v County of Greene*, 115 AD2d 162, 162 [3d Dept 1985]; *Doxtator v Swartout*, 38 AD2d 782, 782-783 [4th Dept 1972]).

Accordingly, it is

ORDERED that those branches of the plaintiff's motion seeking relief against the defendants Marc Mordecai Liechtung, DMD, P.C., individually and doing business as Manhattan Dental Arts, and Marc Mordecai Liechtung, DMD, individually and doing business as Manhattan Dental Arts, is permitted to be withdrawn; and it is further,

ORDERED that those branches of the plaintiff's motion seeking relief against the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., and the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., are granted to the extent that, on or before April 19, 2022,

- (a) the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., and the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., shall produce all items of discovery identified and set forth in this court's September 1, 2021 status conference order, including documentation referable to pre-treatment continuing dental education courses attended by or subscribed to by any of those defendants, except that the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., shall not be obligated to produce all documentation, with patients' names redacted, as to instances in which those defendants employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment;

- (b) the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., and the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., shall produce manufacturers' or distributors' brochures, peer-reviewed literature referable to the procedure, products, and equipment employed in treating plaintiff, and continuing dental education handouts or publications in the possession of said defendant to the extent that any such documentation was generated subsequent to said defendant's last treatment of plaintiff;
- (c) the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., and the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., shall produce written notes employed or relied upon by any of those defendants at their deposition to refresh the deponent's recollection; and
- (d) the defendants South Shore Oral Surgery Associates, P.C., and Richard M. Mirra, D.D.S., shall produce typewritten notes of the plaintiff's chart, to the extent not already provided;

and it is further,

ORDERED that the cross motion of the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., is granted to the extent that the court's September 1, 2021 status conference order is modified by striking the words "documentation, with patients' names redacted, as to instances in which they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment" and substituting therefor the words "information as to the number of times in which they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment, and the period of time over which those procedures were performed," and the cross motion is otherwise denied; and it is further,

ORDERED that, on or before April 19, 2022, the defendants Mitchell Mehlman, DDS, P.C., and Mitchell Mehlman, D.D.S., shall provide all other parties with information as to the number of times in which they employed three implants to support maxillary overdenture prior to the last date of plaintiff's treatment, and the period of time over which those procedures were performed; and it is further,

ORDERED that all other requests for relief are denied.

This constitutes the Decision and Order of the court.

3/2/2022
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE